MEMORANDUM

TO: Bob Rees, Cathy Dupont
FROM: Mike Curtis
DATE: June 11, 2013
RE: Federalism and the balance between state sovereignty and federal preemption

## Issue

This memorandum addresses the principle of federalism and the relationship between state sovereignty and federal authority and federal preemption.

## Scope of Analysis

This memorandum does not purport to give a comprehensive overview or recommendation on the substantive or procedural boundaries between state sovereignty and the delegation of federal authority. Greater research would be required to provide the contours and nuances within specific areas of the law that carry an exact sovereignty classification.

## Analysis

The principle of federalism is set out under the Tenth Amendment to the United States Constitution: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[1] Therefore, in broad terms, the states retain any and all powers not delegated to the federal government, limited only by limitations set forth in the Constitution. Sovereignty can be described as a spectrum, ranging from absolute state sovereignty at one extreme to absolute federal sovereignty at the other. For the purposes of this memorandum, sovereignty has been classified into six tiers: absolute state

[1] U.S. Const. Amend. X.

sovereignty, state sovereignty with federal interaction, state sovereignty influenced by federal inducements, shared or concurrent powers, areas in debate, and strictly federal powers.

***Tier 1. Absolute State Sovereignty***

Powers that can be classified in Tier 1 "Absolute State Sovereignty" could be described as purely the prerogative of the state, free from federal government intervention. In this tier, the only restrictions on the state's prerogative are constitutional fundamental rights of the people, enforced by the judiciary (i.e. freedom of speech, freedom of religion, freedom of the press, etc.). One example of judicial enforcement of a fundamental right is the advent of the one person, one vote doctrine which required proportional representation in the state senate, and required the states to organize their legislatures accordingly.[2] Although the federal court system may rule on the constitutional validity of state laws and actions in light of the Bill of Rights and other fundamental rights, the federal government, specifically the legislative and executive branches, cannot directly interfere.

States retain the power to structure and organize their own government. This includes the establishment, organization, rights, duties, powers, and limitations of the executive, judicial,[3] and legislative branches. Furthermore, a state is free to establish whichever departments and agencies it chooses, and arrange the organization, powers, and duties of those organizations as desired. Additionally, there is no requirement that a state include specific departments or agencies. A state may organize its court system and appoint judges as it desires. A state may establish

[2] *See Reynolds v. Sims*, 377 U.S. 533 (1967).

[3] *Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("The general rule bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them. The States thus have great latitude to establish the structure and jurisdiction of their own courts.") (internal citations omitted).

requirements for state employment and state office, as well as the details and parameters of that office. Essentially, the state is afforded the freedom to structure integral operations in areas of traditional government functions.[4] Furthermore, the state's establishment and organization of its political institutions are equally inviolate.[5]

Although the state is free to structure and manage the state's governmental organization however it chooses, there may be some potential limitations. One potential limitation on the state's organization and management of the state government falls under the Guarantee Clause of the United States Constitution.[6] "The United States shall guarantee to every State in this Union, a Republican Form of Government. . . ."[7] Although the federal government has been given the duty of ensuring a republican form of government, this power lies generally unused, and the question of whether a state organization is truly republican in form is not reviewable before the judiciary. "[I]t is well settled that the questions arising under [the Guarantee Clause] are political, not judicial, in character and thus are for the consideration of the Congress and not the courts."[8] Therefore, a state may construct its government however it sees fit, with the caveat that the organization should be a representative form of government, although it is not clear how or if the federal government would guarantee such representation.

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[4] *National League of Cities v. Usery*, 426 U.S. 833 (1976).

[5] *Baker v. Carr*, 369 U.S. 186, 284 (1962) ("The Court has been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States.").

[6] U.S. Const. Art. IV, section 4.

[7] *Id.*

[8] *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 79–80 (1930) (internal citations omitted).

The state also has inviolate powers to create and manage the state budget. The federal government can induce the state to act by offering federal funding, the underlying premise of this memorandum's classification of Tier 2 "State Sovereignty Influenced by Federal Inducements," but the state can allocate funds and manage appropriations without federal intrusion. The state can also formulate its tax code how it chooses, although the federal government also holds the taxing power as mentioned under this memorandum's classification of Tier 4 "Shared or Concurrent Powers." Additionally, the state may freely establish local governments and manage municipalities. The state is also free to build and manage state government buildings and has control over all state lands.

The state has the responsibility of providing for the health and safety of its citizens. Although that can be a broad and ambiguous description, it includes specific state powers like setting the legal age for consumption of certain substances such as smoking or drinking (however, these regulations may fall within this memorandum's classification of Tier 2 "Sovereignty Influenced by Federal Inducements") and police powers, including the establishment and governance of police and fire departments. Traditionally, the state also has power in the substantive areas of licensing, zoning and land use, property law, contract law, wills and estates, criminal law, and the law of domestic relations (although the DOMA[9] and Proposition 8[10] cases pending in the United States Supreme Court may significantly winnow or broaden the breadth of domestic relations law concerning marriage). The state is free to regulate and legislate how it chooses and where it chooses, subject to constitutional and fundamental rights constraints.

[9] *U.S. v. Windsor*, Supreme Court Docket No. 12-307.

[10] *Hollingsworth v. Perry*, Supreme Court Docket No. 12-144.

***Tier 2. State Sovereignty Influenced by Federal Inducements***

Tier 2 "State Sovereignty Influenced by Federal Inducements" overlaps with Tier 1 "Absolute State Sovereignty." Under Tier 2, legislative power remains purely the prerogative of the state, but state decisions may be affected by conditions attached to federal funding. Congress can effectively regulate under the pretense of spending by using conditional grants of federal money.[11] For example, in *South Dakota v. Dole*, the federal government withheld a percentage of federal highway funds from any state which permitted the purchase of alcohol under a specific age. Conditional grants must be in pursuit of general welfare,[12] they must be clear so states can make an informed decision,[13] there must be a rational relationship between the funding and the condition,[14] and the conditional grant must be constitutional, or in other words, it cannot violate the Bill of Rights.[15] States have relinquished some areas of state sovereignty by accepting conditional grants offered by Congress such as transportation funding (highway speed limits, drinking ages) and healthcare funding. There is a discernible issue of when federal inducement becomes coercion, but the states still retain the power to choose whether to accept the conditional funds.

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[11] *See South Dakota v. Dole*, 483 U.S. 203 (1987).

[12] *See Helvering v. Davis*, 301 U.S. 619 (1937) (in relation to social security funding, the Court found that the laws of the separate states cannot effectively address the national problems the elderly face); *see also Buckley v. Valeo*, 424 U.S. 1 (1976) (Congress had the power to regulate campaign funding in presidential elections for the general welfare of reducing the deleterious influence of large contributions on the political process).

[13] *See Steward v. Davis*, 301 U.S. 548 (1937) (upholding unemployment compensation).

[14] *See South Dakota v. Dole* (highway funds and the minimum drinking age were sufficiently closely related).

[15] *See Sabri v. U.S.*, (preventing the bribery of officials of non-federal organizations that distribute federal funds was not unconstitutionally overbroad).

***Tier 3. Sovereignty with Federal Interaction***

Under this memorandum's Tier 3 "Sovereignty with Federal Interaction," there are powers that remain the state's prerogative, but those powers have been somewhat regulated or affected by the federal government's interaction in some way. For example, states retain the power to organize and conduct elections, including the methods and practices for electing federal officials, including the president. However, in addition to significant court decisions invalidating certain election practices,[16] Congress has enacted legislation specifically dealing with election law, like the Voting Rights Act of 1965.[17] The Voting Rights Act is has been re-enacted several times, but the United States Supreme Court is currently deciding a challenge to its constitutionality in *Shelby, Ala. v. Holder*.[18]

Congress's most common method of interacting with state law is regulation through the commerce clause, but there are some limitations on that power. The United States Supreme Court held in *U.S. v. Lopez* that gun legislation, hate crimes, and criminal activity affect generally but do not directly relate to interstate commerce (although the revised Federal Gun Free School Zones Act[19] incorporated the a foundation of interstate commerce, is in effect today,

[16] *See Reynolds v. Sims*, 377 U.S. 533 (1964) (applying the one-person-one-vote doctrine to the non-proportional representation of a state senate); *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (invalidating Virginia's poll tax).

[17] 42 U.S.C. § 1973. *See also Katzenback v. Morgan*, 384 U.S. 641 (1966) (invalidating literacy tests under the Voting Rights Act), *Thornburg v. Gingles*, 478 U.S. 30 (1986) (invalidating multimember districting schemes under the Voting Rights Act);

[18] *Shelby, Ala. v. Holder*, Supreme Court Docket No. 12-96.

[19] 18 U.S.C. § 922(q).

and has been upheld by several circuit courts).[20] Other such substantive areas include education and healthcare.

In a related vein, the issue of primacy may impact a state's regulation over an area. Primacy is a system that allows the state to choose whether to be the governing or primary authority over regulation and enforcement in a given area. Primacy is essentially federal preemption because the federal government controls policies and establishes specific base requirements. However, the state then has the option to become the primary enforcement agent for the federal policies. Environmental regulations are a good example of primacy. As the primary authority, the state can enact further regulations and implement its own policies, provided that the state always meets the federal base requirements. This allows the state some discretion to regulate more than or differently from the federal government, but that discretion is constrained by the federal base requirements.

Although a federal law may preempt a state law in cases when there is less than absolute state sovereignty, the federal government cannot force a legislature to regulate or enact and administer a federal regulatory program.[21] This inviolate state power of regulation extends to prevent the federal government from requiring legislative or executive *enforcement* of a federal regulatory program, effectively preventing the federal government from commandeering state officials or resources to execute or enforce federal law.[22]

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[20] *U.S. v. Lopez*, 514 U.S. 549 (1995).

[21] *N.Y. v. U.S.*, 505 U.S. 144 (1992).

[22] *U.S. v. N.Y.*; *Printz v. U.S.*, 521 U.S. 898 (1987); *Reno v. Condon*, 528 U.S. 141 (2000).

***Tier 4. Shared or Concurrent Powers***

There are several powers that are granted to the federal government and retained by the states as well. These powers do not necessarily conflict, but both governing bodies may regulate in the same area. These powers include the creation and collection of taxes; the creation, organization, and management of a judiciary; the construction of highways and infrastructure; the power to borrow money and charter banks and corporations; the power to spend on behalf of general welfare; and the power to effectuate takings.

***Tier 5. Areas in debate***

There admittedly are several areas that remain in debate. This memorandum does not seek to create an exhaustive list of such issues, nor does it purport to offer advice on the constitutional or states' rights issues at play. However, some of these issues include defining the states' power to regulate commerce inside a geographically unique region, purely intrastate commerce, national and intrastate gun control, the death penalty, assisted suicide, medical marijuana, marriage equality, airport security, health care and the Affordable Care Act, voter identification or registration, etc.

***Tier 6. Strictly Federal Powers***

Under the Tenth Amendment to the United States Constitution, the federal government only has the powers delegated to it by the states under the Constitution. These powers are described under the standards for evaluation of federal law outlined in the recently amended State Commissions and Councils Code.[23] Some of these constitutional enumerations include the powers to "override state laws regulating the times, places, and manner of congressional

[23] 63C-4a-304.

elections, other than the place of senatorial elections;"[24] "veto bills, orders, and resolutions by Congress;"[25] "lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States;"[26] "borrow money on the credit of the United States;"[27] "regulate commerce with foreign nations, among the several states, and with the Indian tribes;"[28] "make all laws which shall be necessary and proper for carrying into execution the powers listed in [the Constitution];"[29] "establish the rules by which the records and judgments of states are proved in other states;"[30] "manage federal property;"[31] and "dispose of federal property."[32] Of concern in the question of state sovereignty, the commerce clause is the federal government's broadly interpreted power that likely presents most of the danger to the traditionally purely state issues, while the taxing and spending powers also play a large role in the federalism arena.

## Conclusion

Sovereignty is not easily reduced to a determination of whether a power resides with the state or with the federal government. There is a spectrum between the two extremes of absolute state or federal sovereignty, and specific powers appear across the breadth of that spectrum.

[24] *Id.* at (1)(b).

[25] *Id.* at (1)(c).

[26] *Id.* at (1)(d)(i).

[27] *Id.* at (1)(d)(ii).

[28] *Id.* at (1)(d)(iii).

[29] *Id.* at (1)(d)(xviii).

[30] *Id.* at (1)(d)(1)(k).

[31] *Id.* at (1)(d)(l)(i).

[32] *Id.* at (1)(d)(l)(ii).

There are some powers which the states never delegated to the federal government, powers which the federal government has no power to preempt. However, there are many areas in which the federal government comes into play through conditional funding or broader legislation that affects, although does not pre-empt, state authority. States also hold some powers that are concurrently held or shared by the federal government. Finally, there are some powers that are held exclusively by the federal government that are unreachable by the states. Although the issue of state sovereignty is not easily reduced to black and white lines, it is clear that the states do hold certain powers inviolate and exclusive of federal control.